DATUK HUSSAIN MOHAMED

v.

FIRST MALAYSIA FINANCE BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[COMPANIES WINDING-UP NO. D2-28-70-89]
1 NOVEMBER 1989

COMPANY LAW: *Winding-up petition - Minority shareholder - Oppression - Section 181(1)(a) of the Companies Act 1965 - Intervener - Application to restructure - Winding-up and restructure petitions ordered to be heard together - Jurisdiction of Court to vary order made on 3 April 1989 - Conduct of petitioner - Locus standi of petitioner- Consolidation of fractional shares under s. 31c of the Central Bank of Malaysia Ordinance 1958.*

The petitioner, a minority shareholder filed a winding up petition under s. 181(1)(a) of the Companies Act 1965. About 2 months later, Bank Negara filed an Originatory Petition proper praying *inter alia* for leave to restructure the respondent company and for a stay of the winding up petition, or that both petitions be heard together.

Pending the hearing of Bank Negara's motion, the respondent had, in the meantime obtained on interim injunction *ex parte* restraining the petitioner from proceeding further with the winding up petition.

On 3 April 1989 the Court ordered that the winding up petition and the Bank's restricting petition be heard together.

Subsequently, on 20 June 1989 the Bank filed another motion to have the order made on 3 April 1989 varied to the extent that its restructuring petition be heard and determined notwithstanding that the winding-up petition was not ready for hearing.

The following issues were raised:

(i) whether the conduct of the petitioner in failing to get the petition ready for hearing has been unreasonable.

(ii) whether the Court can vary the order made on 3 April 1989.

(iii) Whether the petitioner has *locus standi* once the order to restructure has been made.

(iv) Whether s. 31 of the Central Bank of Malaysia Ordinance 1958 confers the right to have the shares in the respondent company consolidated in the manner asked for in the amended petition to restructure.

Held:

[1] The conduct of the petitioner was most unreasonable in failing to take any steps to have his petition ready for hearing.

[2] That the order made on 3 April 1989 was only directional. The rights and obligations of the parties had not yet been determined. As such the Court has jurisdiction to vary the said order.

[3] The effect of reducing the respondent's capital does not affect the status of the petitioner as a registered shareholder. The petitioner still has *locus standi* to proceed with his petition.

[4] Section 31c of the Central Bank of Malaysia Ordinance 1958 makes no mention of consolidation of fractional shares. But the consolidation of fractional shares was part and parcel of the machinery consequential upon a reduction of capital. As such nothing new was being introduced into s. 31c.

[Order accordingly.]

Legislation referred to:
Central Bank of Malaysia Ordinance 1958, s. 31c
Companies Act 1965, s. 181(1)(a)
Finance Companies Act 1969, s. 33(iii)
Rules of the High Court 1980, O. 20 r.11

For the Bank Negara, the intervener - C.V. Das (John Mathew with him); M/s. Shook Lin & Bok
For the petitioner - M.S. Murthi; M/s. Murthi & Partners

JUDGMENT

Siti Norma Yaakob J:

The petitioner in this winding up petition is the registered holder of 1,000 shares in the respondent company and as a minority shareholder, he complains that the affairs of the respondent have been conducted in a manner oppressive to him and he therefore brings this petition within s. 181(1)(a) of the Companies Act 1965.

The acts of oppression complained of by the petitioner date back to December 1984 when the present management took over the control of the respondent by the purchase of the controlling block of shares at the market value of RM4.50 per share. Following this takeover, the new management made two allotments of shares to themselves amounting to 8,274,000 shares at the nominal value of RM1 per share thus making a hefty profit for themselves. The petitioner and the other minority shareholders were never informed of these allotments, nor given the chance to apply for such allotments and neither have they been paid any dividends, the inference being that all the income of the respondent had been cancelled to the management personally.

The resulting acts of oppression complained of by the petitioner are borne out by the stand taken by Bank Negara in assuming control of the business of the respondent on 16 January 1989 under s. 33(iii), Finance Companies Act 1969, so as to facilitate the capital restructuring of the respondent by reducing its present paid up capital of RM20.74 million divided into 20.274 million shares of RM1 each to RM202,704 at RM1 each under s. 31c Central Bank of Malaysia Ordinance 1958. For this very purpose, Bank Negara had filed Originating Petition 26-13-89 on 17 March 1989, almost 2 months after the winding up petition was filed on 31 January 1989.

Since the prayers sought for by Bank Negara run diametrically opposite to the winding up petition, Bank Negara then proceeded to apply firstly to intervene in this winding up petition and secondly that the winding up petition be stayed or heard together with Bank Negara's petition and that appropriate orders be made on the two petitions.

Pending the hearing of Bank Negara's motion to intervene, the respondent had, in the meantime, on 25 March 1989, obtained an interim injunction *ex-parte*, restraining the petitioner, his servants or agents, from proceeding further with the winding-up petition, particularly in advertising it or from holding or participating in any press conference or public forum to comment upon or discuss the petition until further order. Up to this day, the injunction still stands as the petitioner had not applied to have it set aside.

After obtaining the interim injunction, the respondent had also filed a notice of motion to have the winding up petition stayed/and or set aside and this motion was fixed for hearing on 3 April 1989 together with Bank Negara's motion for leave to intervene.

On 3 April 1989, only Bank Negara's motion was proceeded with when I granted Bank Negara the necessary leave to intervene in this winding up petition and that the winding up petition and the restructuring petition be heard together and appropriate orders made accordingly.

The respondent's motion to have the winding up petition set aside/and or stayed was adjourned on 3 April 1989 and to this day, the application is still pending.

On 20 June 1989 2½ months after obtaining the order to intervene, Bank Negara filed another motion to have that part of the intervention order obtained on 3 April 1989 varied to the extent that its restructuring petition be heard and determined notwithstanding the petitioner's winding up petition as there is unreasonable delay on the part of the petitioner to get his petition ready for hearing together with the restructuring petition.

It is not disputed that since 3 April 1989 the petitioner had not done anything to have his petition ready for adjudication together with Bank Negara's petition. As a first step, he should have applied to have the *ex-parte* injunction obtained by the respondent against him, set aside, and he had well over two months to do just that, but he had not done anything. Neither has he given any reason why he had failed to take any steps to have his petition ready for adjudication or given any indication when he would do so. Under the circumstances, his conduct has been most unreasonable and I consider that his petition should not stand in the way of Bank Negara's petition which has been filed solely for the purpose of protecting the interests of the 90,972 depositors, who between them had invested a total sum of RM406.3 million with the respondent.

Furthermore the acts of oppression complained of by the petitioner happened in 1985, but it took the petitioner another 4 years before he decides to file his petition to wind up the respondent by which time Bank Negara had already injected RM148 million with the respondent to meet the withdrawals made by the depositors of the respondent, and further delay in the hearing of its restructuring petition would defeat the very purpose of such an exercise and increase the Bank's obligations to inject more capital to the respondent as withdrawals by depositors still continue to be made.

In the course of arguments the following issues were also raised.

1 Whether the Court has the jurisdiction to vary its own order as the petitioner maintains that the order dated 3 April 1989 is a final order.

2 Whether the petitioner has the *locus standi* to proceed on his petition once the order to restructure has been ordered.

3 Whether s. 31c of the Central Bank of Malaysia Ordinance 1958 confers the right to have the shares in the respondent company consolidated in the manner asked for in the amended petition to restructure.

The petitioner's objection to jurisdiction is founded on the well settled law that once an order or judgment pronounced by a Court has been drawn up and perfected, it cannot be altered or modified except as to correct errors in expressing the intention of the Court (the slip rule powers) under O. 20 r. 11.

In this case, the slip rule does not apply as there is no slip and the petitioner maintains that the only way the order can be varied is for the Bank Negara to appeal against the order. As such Bank Negara cannot come before the same Court again as the Court is already *functus officio*.

At this stage, it is pertinent to ask when does a Court become *functus officio*? A Court becomes *functus officio* when it has already made a final pronouncement on the rights of the parties appearing before it. This must however be distinguished from orders which are in the nature of directions as to how the future proceedings on the cause of action that is before the Court are to be conducted. These orders which are in the nature of directions can be varied by the same Court that granted the original order as the Court is not *functus officio*. It only becomes *functus officio* once the rights of the parties have been determined as the effect of each proceedings is to bring all proceedings to an end.

In this case the order that is sought to be varied is the second limb of the order dated 3 April 1989. That part of the order as it stands gives directions that the winding up petition be stayed and heard together with Bank Negara's restructuring petition. In substance it is only a directional order as it lays down the future conduct as to the mode of trial of the 2 petitions. The rights and obligations of the parties to the 2 petitions, have not yet been determined by the order and to that end, it is not a final order that renders the Court that makes the order *functus officio*. To that end the petitioner's objection as to jurisdiction must fail as the Court has the jurisdiction to entertain and if it considers fit to do so, to dismiss or allow the motion.

The effect of reducing the respondent's capital does not effect the status of the petitioner as a registered share holder. His name is not removed from the register and as the registered share holder, he still has the *locus standi* to proceed with his petition. What would be effected by the reduction exercise is the quantity and value of the petitioner's shares as they would be reduced to 100 shares at 1 sen each. Thus the petitioner may still proceed on his petition even though Bank Negara may succeed on its application to restructure.

Under Bank Negara's original petition, holders of fractional shares in the respondent company would be deprived of any benefit, as such fractional shares would be cancelled.

In its amended petition, what Bank Negara proposes to do is that upon the respondent's capital being reduced and on the expiry of 30 days from the date of any call being made by the respondent on its shareholders to pay on their respective shares, if no such payment is made, the shares shall be consolidated so that every 100 ordinary share shall constitute one ordinary share at RM1. This nominal sum shall be credited as having been paid up and the remaining 99 shall be cancelled. However, where the consolidation results in a fraction or fractions of shares being created, each of such fraction or fractions shall be deemed to constitute one ordinary share of RM1 which in turn will also be credited as being paid up.

By amending its petition what Bank Negara in fact did is to consolidate fractional shares where no such provision was made in its original petition. What it means in practice is that under the amendment, fractional shares such as say 5/100 would be treated as 1 share and credited as fully paid to the shareholder where before the amendment, no such provision was made. Thus the sense of deprivation arising from the ownership of a fractional share is taken away. To that extent, I cannot see what logical objection the petitioner can have to the effect of consolidation where fractional shares are concerned.

Neither do I consider that there is any merit to the petitioner's contention that as s. 31c of the Central Bank of Malaysia Ordinance 1958 makes no provision for the consolidation of shares, the Court is not empowered to order so.

It is true that s. 31c makes no mention of consolidation of shares or fractional shares when the capital of a company is reduced but the consolidation that is sought by Bank Negara is consequential upon the respondent's capital being reduced and as such, it is only one of the modes of restructuring which Bank Negara considers to be beneficial to the depositors. It is not introducing anything new into s. 31c but is part and parcel of the machinery consequential upon a reduction of capital.

On the facts of this case, I had considered that public interest, particularly as it ellected well over 90,000 depositors in the respondent's company far outweighs the interest of one single shareholder, the petitioner in this winding up petition. Bearing in mind the financial standing of the respondent's company, this in itself provides a good reason that the hearing of the restructuring petition be proceeded without any unduly delay and on that conclusion, I had allowed Bank Negara's motion to have that part of the order dated 3 April 1989 varied so as to allow the bank's petition to be heard before the winding up petition.

In making this order, I had also dismissed the petitioner's oral application for a stay as no special circumstances were put forward and that a stay would defeat the very purpose why I had allowed the order of Court dated 3 April 1989 varied.

Also found at [1990] 1 CLJ 258